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A

Sanggapelai a/l Chandran v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–128 OF 2011
BALIA YUSOF, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
10 NOVEMBER 2014

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person acquitted for charge of murder — Appeal by prosecution to Court of Appeal — Case remitted back to High Court — Accused person called to enter defence — Defence of self defence — Whether defence probable — Whether defence cast reasonable doubt on prosecution case — Penal Code s 302*

D

The appellant was charged for murder, an offence under s 302 of the Penal Code but was acquitted and discharged by the High Court for failure of the prosecution to prove a prima facie case against him. The public prosecutor E appealed against the said order of acquittal and discharge and the Court of Appeal remitted the case to the High Court ordering for the defence to be called. Briefly, the facts were one Murugan ('SP4') had been informed that his brother Kumar had been assaulted by a person named Vijayan. SP4 then together with Kumar and his mother, met Vijayan's father as well as Vijayan at F a badminton court where his brother and Vijayan had another fight. SP4 approached the deceased to accompany him to the police station to lodge a report. They went on a motorcycle and the deceased was the rider, whilst SP4 rode as pillion. Suddenly, a motorcycle overtook his motorcycle and blocked him. SP4 recognised the person riding pillion on the overtaking motorcycle as G the appellant whom he had known for the past 25–30 years. SP4 could not however identify the rider of that motorcycle. SP4 fell from his machine, felt scared and ran. The deceased also ran. After running for about 200 meters, SP4 heard a loud scream 'Aiyooh!'. SP4 came back towards the direction where the scream came from and saw the deceased motionless with his face facing H downwards and blood on his head. The deceased died as a result of incised wound to the head and neck. The appellant's defence was that the deceased had assaulted his brother. He intended to meet the deceased and question him in respect of the incident. Accompanied by SP6, they went on a motorcycle and rode on pillion. He met the deceased at Bukit Belimbing River Estate. He I could recognised the deceased as the pillion rider of the motorcycle ahead of him. After SP6 overtook SP4's motorcycle, the appellant said he jumped off the motorcycle which he was riding as pillion, and blocked the motorcycle which SP4 was riding, causing SP4's motorcycle to stop. SP4 then fell to the ground and fled leaving his motorcycle at the scene. SP6 also left the appellant there.

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The appellant further testified that the deceased had a *parang* with him. He questioned the deceased why he assaulted his brother. The deceased then attacked him with the *parang* which he evaded. The deceased, whilst holding the *parang*, then knocked into the fallen motorcycle and fell. The appellant grabbed the *parang* from the deceased. Upon hearing the defence case, the High Court judge found the appellant guilty and sentenced him to death. Hence, the present appeal.

Held, dismissing the appeal:

(1) The injuries sustained by the deceased were more consistent with the deceased being hit by a *parang* from the rear. According to the pathology report, the deceased was hit for 15 times out of which three were at the rear of the deceased's head and neck. This was not consistent with being hit two or three times as claimed by the appellant in his defence. Furthermore, it was admitted by the appellant himself that he threw the *parang* which was recovered under a heap of oil palm leaves at an oil palm estate. The explanation given by the appellant in his defence was unreasonable and improbable as a whole, and that his defence had failed to cast a reasonable doubt on the prosecution's case (see paras 15–16).

(2) This was a case heard by a judge sitting alone and not with a jury. As a trier of both facts and law, the trial judge made such findings and decide on her own. Her Ladyship had considered the appellant's defence and was fully conscious of the fact that the defence was one of self defence. The right of private defence was not available to the appellant. Her Ladyship had rightly concluded the offence was not committed in self defence (see paras 21 & 27).

[Bahasa Malaysia summary

Perayu dituduh membunuh, kesalahan di bawah s 302 Kanun Keseksaan tetapi telah dibebaskan dan dilepaskan oleh Mahkamah Tinggi kerana kegagalan pihak pendakwaan untuk membuktikan kes prima facie terhadapnya. Pendakwa raya merayu terhadap perintah pembebasan dan perlepasan tersebut dan Mahkamah Rayuan meremit kes tersebut kepada Mahkamah Tinggi memerintahkan pembelaan dipanggil. Secara ringkas, fakta adalah seorang yang bernama Murugan ('SP4') telah diberitahu bahawa saudara lelakinya Kumar telah diserang oleh seorang yang bernama Vijayan. SP4 kemudiannya bersama Kumar dan ibunya, menemui bapa Vijayan di gelanggang badminton di mana saudara lelakinya dan Vijayan sekali lagi bergaduh. SP4 mendekati si mati untuk menemaninya ke balai polis untuk membuat laporan. Mereka pergi dengan menunggang motosikal dan si mati adalah penunggangnya. Tiba-tiba satu motosikal memotong motosikalnya dan menyekat dia. SP4 kenal orang yang membonceng motosikal yang memotong tersebut sebagai perayu yang dikenalinya selama 25–30 tahun. SP4 walau bagaimanapun tidak dapat mengenal pasti penunggang motosikal tersebut. SP4 terjatuh daripada

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motosikalnya, rasa takut dan berlari. Si mati juga berlari. Selepas berlari kira-kira 200 meter, SP4 mendengar jeritan yang kuat 'Aiyooh!'. SP4 datang balik ke bahagian dari mana jeritan tersebut datang dan melihat si mati tidak bergerak dengan mukanya menghadap ke bawah dan darah atas kepalanya. Si mati meninggal dunia akibat luka bertakik di kepala dan lehernya. Pembelaan perayu adalah bahawa si mati telah menyerang saudara lelakinya. Dia berniat untuk berjumpa si mati dan menyoalnya berkaitan kejadian tersebut. Ditemani oleh SP6, mereka menunggang motosikal dan membonceng. Dia bertemu si mati di Estet Sungai Bukit Belimbing. Dia dapat mengenali si mati sebagai penunggang motosikal di hadapannya. Selepas SP6 memotong motosikal SP4, perayu menyatakan yang dia melompat daripada motosikal yang diboncengnya, dan menyekat motosikal yang ditunggang oleh SP4, menyebabkan motosikal SP4 berhenti. SP4 kemudiannya terjatuh ke tanah dan lari meninggalkan motosikalnya di tempat kejadian. SP6 juga meninggalkan perayu di situ. Perayu selanjutnya memberi keterangan bahawa si mati mempunyai parang dengannya. Dia menyoal si mati mengapa dia menyerang saudara lelakinya. Si mati kemudian menyerangnya dengan parang yang mana dielaknya. Si mati, semasa memegang parang, kemudiannya terlanggar dengan motosikal yang jatuh dan jatuh. Perayu merampas parang daripada si mati. Selepas mendengar kes pembelaan, hakim Mahkamah Tinggi mendapati perayu bersalah dan menjatuhkan hukuman mati. Maka, rayuan ini.

Diputuskan, menolak rayuan:

(1) Kecederaan yang dialami oleh si mati adalah lebih konsisten dengan si mati dipukul dengan parang dari belakang. Mengikut laporan patologi, si mati dipukul 15 kali, tiga daripadanya di belakang kepala dan tengkok si mati. Ini bukan konsisten dengan dipukul dua atau tiga kali seperti yang didakwa oleh perayu dalam pembelaannya. Selanjutnya, ia diakui oleh perayu bahawa dia membaling parang tersebut yang ditemui di bawah timbunan daun kelapa sawit di estet kelapa sawit. Penjelasan yang diberikan oleh perayu dalam pembelaannya tidak munasabah dan tidak mungkin secara keseluruhannya, dan bahawa pembelaannya telah gagal untuk melemparkan keraguan munsabah ke atas kes pihak pendakwaan (lihat perenggan 15–16).

(2) Ini adalah kes yang didengar oleh seorang hakim yang mendengar seorang dan bukan dengan juri. Sebagai pencuba kedua-dua fakta dan undang-undang, hakim perbicaraan membuat dapatan dan memutuskan sedemikian dengan sendiri. Yang Arif telah mempertimbangkan pembelaan perayu dan sedar sepenuhnya mengenai fakta bahawa pembelaan adalah satu iaitu mempertahankan diri. Hak kepada pembelaan persendirian tidak ada untuk perayu. Yang Arif telah secara betul memutuskan kesalahan bukan dilakukan dalam mempertahankan diri (lihat perenggan 21 & 27).]

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Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Dharry Frully Hiu v PP Criminal Appeal No B-05–269–11 of 2012 (unreported), CA (refd)

Frans Hiu v PP Criminal Appeal No B-05–268–11 of 2012 (unreported), CA (refd)

Teoh Seng Lian v PP [1986] 1 MLJ 474, SC (distd)

Legislation referred to

Penal Code ss 300 Exception 2, 302, 304

Appeal from: Criminal Trial No 45–3 of 2000 (High Court, Shah Alam)

Karpal Singh (Zaleha Al Hayat with him) (Karpal Singh & Co) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Balia Yusof JCA:

[1] The appellant was charged for murdering one Sellathambi a/l Muniandy under s 302 of the Penal Code. He was acquitted and discharged by the Shah Alam High Court for failure of the prosecution to prove a prima facie case against him.

[2] The public prosecutor had appealed against the said order of acquittal and discharge and by an order made on 10 January 2011, the Court of Appeal had remitted the case to the Shah Alam High Court ordering for the defence to be called.

[3] Upon hearing the defence case, the learned High Court judge found the appellant guilty and sentenced him to death.

[4] He now appeals to the Court of Appeal against the said conviction and sentence.

[5] We heard the appeal and we unanimously dismissed the same and affirmed the conviction and sentence passed by the learned High Court judge.

[6] We now give our reasons.

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[7] The prosecution's evidence against the appellant may be stated as follows. On 30 June 1999 at about 9.15pm, Murugan a/l Muniandy ('SP4') had been informed that his brother Kumar had been assaulted by a person named Vijayan. SP4 then together with Kumar and his mother, met Vijayan's father as well as Vijayan at a badminton court where his brother and Vijayan had another fight. SP4 told Vijayan's father that he would be lodging a police report. At about 10.30pm, SP4 approached the deceased to accompany him to the Kuala Selangor Police Station to lodge a report. They went on a motorcycle and the deceased was the rider, whilst SP4 rode as pillion. Suddenly, a motorcycle overtook his motorcycle and blocked him. SP4 recognised the person riding pillion on the overtaking motorcycle as the appellant whom he had known for the past 25–30 years. SP4 could not however identify the rider of that motorcycle. SP4 fell from his machine, felt scared and ran. The deceased also ran. After running for about 200 meters, SP4 heard a loud scream 'Aiyooh!'. SP4 came back towards the direction where the scream came from and saw the deceased motionless with his face facing downwards and blood on his head. SP4 ran to a sundry shop nearby and informed the people there that the deceased was injured. Together with some people from the sundry shop and the deceased's brother, the deceased was taken to Hospital Tanjung Karang where a post mortem was done revealing 15 injuries on his person. The cause of death was stated to be 'incised wound to the head and neck'.

[8] Another material witness called by the prosecution was SP6 who testified that while he was playing badminton that night, the appellant approached and informed him that his ('the appellant') brother by the name of Selvam had been assaulted by the deceased. After finishing his game, he met the appellant again and they both rode on a motorcycle. He was the rider while the appellant was riding pillion. He was directed by the appellant to take the laterite road towards Bukit Belimbing and saw a motorcycle about 100 meters ahead. The appellant asked him to overtake the motorcycle. According to SP6, he suddenly realised that the appellant was no longer riding pillion with him and he made a U-turn. After making a U-turn, he saw the other motorcycle and upon asking the appellant what happened, the appellant replied that he had assaulted Sellathambi ('the deceased') because Sellathambi had assaulted his brother. After that, both SP6 and the appellant went home.

[9] The appellant gave evidence on oath. He called no other witness. He testified that the deceased had assaulted his brother, named Selvam. He intended to meet the deceased and question him in respect of the incident. Accompanied by Kannan ('SP6'), they went on a motorcycle number PBG 435. He was riding pillion. He met the deceased at Bukit Belimbing River Estate. He could recognised the deceased as the pillion rider of the motorcycle ahead of him. After SP6 overtook SP4's motorcycle, the appellant said he jumped off the motorcycle which he was riding as pillion, and blocked the

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motorcycle which SP4 was riding, causing SP4's motorcycle to stop. SP4 then fell to the ground and fled leaving his motorcycle at the scene. SP6 also left the appellant there.

[10] The appellant further testified that the deceased had a *parang* with him. He questioned the deceased why he assaulted his brother. The deceased then attacked him with the *parang* which he evaded. The deceased, whilst holding the *parang*, then knocked into the fallen motorcycle and fell. The appellant grabbed the *parang* from the deceased. The deceased took off his crash helmet and tried to hit him with the crash helmet. The appellant again evaded the deceased's attempt to hit him. In evading the deceased's attack, the *parang* which he had grabbed from the the deceased, hit the deceased's body about two or three times and the deceased fell to the ground. SP6 then came back and together they went home.

[11] The appellant said he threw the *parang* in the jungle area. When SP6 asked him where the deceased was, he replied that the deceased was unconscious. When SP6 questioned him why the deceased was assaulted, he replied, it was because the deceased had assaulted his younger brother. Feeling scared, he went to stay in Kuala Lumpur. His mother later called him informing that the police was looking for him. He then contacted the police and was arrested.

THE APPEAL

[12] The late Mr Karpal Singh learned counsel for the appellant submitted that this is a fit and proper case for a reduction of the charge. The question whether it was the deceased or the appellant who had the *parang* is very crucial. The appellant gave evidence in his defence about 11 years after the incident. The appellant may have exceeded his right of self defence and the learned trial judge should have amended the charge to culpable homicide not amounting to murder. Learned counsel further submitted the case comes under Exception 2 of s 300 of the Penal Code.

[13] Learned counsel also informed us that the appellant had made representations to the attorney general for a reduction of the charge, but was turned down.

[14] On the issue of who actually had the *parang*, the learned trial judge had made a finding of fact which we found to be unassailable. We take the liberty to reproduce below what the learned trial judge had found at pp 8–9 of her grounds of judgment (pp 42–43 of *rekod rayuan Jilid* 3) which stated:

> True, as submitted by the Defence Counsel, Encik Karpal, that no evidence was led by the prosecution that the accused was armed with a *parang* that night. The record

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shows that Kanan (SP6) the rider of the motorcycle which the accused was riding pillion, made no mention of the deceased being armed with a *parang*. As for the other witness present at the scene, Murugan (SP4), the rider of the motorcycle the deceased was riding pillion, also made no mention of the presence of a *parang* that night. The proved fact however is that the deceased sustained severe slashed wounds on his body, inter alia, the back of the head and neck as described in the post mortem report P48 which could have been caused by a *parang*. The proved fact further is that there was in fact a *parang* at the material time at the scene where the accused confronted the deceased.

In weighing this issue whether it was the accused or the deceased being the person who brought and armed with a *parang*, I bore in mind the following, why would two persons (the deceased and the SP4) who were en route to lodge a report at Balai Polis Kuala Selangor in respect of the assault on SP4's brother carry a *parang*? On the evidence it was the accused who was seeking the deceased out to confront him of the assault on his brother, Selvam. It is in evidence he first went to the deceased's house, then, when failed to meet him there, to then proceed to seek him out and confront him. Based on the proved facts, I am of the view, it is more likely that it was the accused who was armed with the *parang*, not the deceased. The accused's story of the deceased being armed with a *parang*, and that he managed to wrest the *parang* which the deceased was holding, cannot possibly be true and I accordingly reject it.

[15] Further down, the learned trial judge also made a finding that the injuries sustained by the deceased were more consistent with the deceased being hit by a *parang* from the rear. SP13, the phatologist gave evidence to show that the deceased were hit for 15 times out of which three were at the rear of the deceased's head and neck. This is not consistent with being hit two or three times as claimed by the appellant in his defence. Again, it was admitted by the appellant himself that he threw the *parang* (exh P24) which was recovered under a heap of oil palm leaves at an oil palm estate.

[16] We agree with the finding of the learned trial judge that the explanation given by the appellant in his defence was unreasonable and improbable as a whole, and that his defence had failed to cast a reasonable doubt on the prosecution's case.

[17] Learned counsel referred to the case of *Teoh Seng Lian v Public Prosecutor* [1986] 1 MLJ 474 in his submission on Exception 2 to s 300 of the Penal Code.

[18] The appellant in *Teoh Seng Lian* was charged for murder. There had been a business misunderstanding between the appellant and the husband of the deceased. The defence evidence showed that when the appellant asked for a loan of money from the deceased, she refused, scolded and chased him, hitting him with a broom and then throwing a knife at him. The knife missed him and fell to the ground. Both went for the knife but the appellant gained

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possession of it and slashed her. When she fell on the ground, he picked a stone and hit her on the head. At the trial with a jury, only two types of defence were brought to the attention of the jury by the judge, viz, the exercise of the right of self defence and whether there was grave and sudden provocation. The jury returned a majority verdict of guilty by five to two. The appellant appealed.

[19] The Supreme Court held that the trial judge in the said case had failed to explain Exception 2 of s 300 of the Penal Code to the jury. Further, the trial judge's direction to the jury on the law relating to the right of private defence was sketchy and inadequate. The conviction on culpable homicide not amounting to murder under the first limb of s 304 of the Penal Code was recorded.

[20] Learned counsel submitted that in the light of the evidence given by the appellant in his defence, it is probable that he exercised the right of private defence in good faith. The learned trial judge, according to counsel, ought to have considered this and reduce the charge to s 304 of the Penal Code.

[21] We do not find any merit in the submissions. This is a case heard by a judge sitting alone and not with a jury. As a trier of both facts and law, the learned trial judge made such findings and decide on her own. Her Ladyship had considered the appellant's defence and was fully conscious of the fact that the defence was one of self defence. This is apparent from a passage in her grounds of judgment at p 43 of the *rekod rayuan Jilid* 3 which says:

> The defence story that it was one of self defence, that of being hit with a *parang* brought by the deceased, and thereafter, from being hit with a crash helmet, cannot also be accepted for the reason that the injuries sustained by the deceased as described by Dr. Hamidah bt Abdul Jalil (SP13) were not consistent with being hit 2 or 3 times as testified by the accused, but 15 times, out of which 3 were at the rear of the deceased's head and neck. The injuries sustained is more consistent with the deceased being hit by a *parang* from the rear and the wounds more appropriately described, as submitted by the DPP as 'defensive wounds'.

[22] Her Ladyship had found the appellant's story as being unreasonable and improbable and had in effect, rejected the defence of self defence. The issue of addressing her mind on Exception 2 to s 300 of the Penal Code therefore does not arise.

[23] The case cited by learned counsel is easily distinguishable from the case before us and is inapplicable.

[24] Exception 2 to s 300 of the Penal Code provides:

> Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by

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law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

[25] In *Frans Hiu v Public Prosecutor* (Criminal Appeal No B-05–268–11 of 2012) and *Dharry Frully Hiu v Public Prosecutor* (Criminal Appeal No B-05–269–11 of 2012) which were heard together, this court had an occasion to deal with the law on private defence. The court said:

> [25] The right of private defence commences as soon as there is a reasonable apprehension of danger to the body of a person and that right continues for as long as the danger exits, (see *Public Prosecutor v Ngoi Ming Sean* [1982] 1 MLJ 24, *Ya bin Daut v Dato' Balwant Singh (No 2)* [2003] 3 MLJ 395).
>
> [26] Section 99 of the Penal Code provides a limitation to the right of private defence. If an accused person has time to have recourse to seek the protection of a public authority or inflicts more harm than necessary for the purpose of defending his person, he cannot avail himself of the protection provided by the defence.

[26] Continuing at para 28 of the judgment, the court futher said:

> [28] The Indian Supreme Court in *Darshan Singh v State of Punjab* AIR 2010 SC 1212, in considering the law on private defence under the Indian Penal Code had enumerated the following principles at pp 1223–1224 as follows:
>
> (i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.
>
> (ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.
>
> (iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.
>
> (iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.
>
> (v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.
>
> (vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

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(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

[27] Having considered the facts and circumstances and with the evidence produced in court, we are in agreement with the learned trial judge in finding that the right of private defence was not available to the appellant. Her Ladyship had rightly concluded the offence was not committed in self defence.

[28] For the reasons stated above, we found no merit in the appeal and the appeal is dismissed. The conviction and sentence passed by the High Court is affirmed. Our decision is unanimous.

Appeal dismissed.

Reported by Afiq Mohamad Noor